

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re:)
)
UNITED STATES MINERAL PRODUCTS) Chapter 11
COMPANY, d/b/a ISOLATEK)
INTERNATIONAL,) Case No. 01-02471 (RJN)
)
Debtor.) Appeal No. 03-98 (SLR)
_____)
)
UNITED STATES MINERAL PRODUCT)
COMPANY, d/b/a ISOLATEK)
INTERNATIONAL,)
)
Appellant,)
)
v.) Civ. No. 03-956-SLR
)
OFFICIAL COMMITTEE OF ASBESTOS))
BODILY INJURY AND PROPERTY)
DAMAGE CLAIMANTS,)
)
Appellee.)

MEMORANDUM ORDER

At Wilmington this 16th day of January, 2004, having reviewed the papers submitted by the parties and heard oral argument;

IT IS ORDERED that the bankruptcy court's order of August 27, 2003 (D.I. 21 at B555) is affirmed and the appeals denied, for the reasons that follow:

1. **Standard of Review.** This court has jurisdiction to hear an appeal from the bankruptcy court pursuant to 28 U.S.C. § 158(a). In undertaking a review of the issues on appeal, the court applies a clearly erroneous standard to the bankruptcy court's findings of fact and a plenary standard to that court's

legal conclusions. See Am. Flint Glass Workers Union v. Anchor Resolution Corp., 197 F.3d 76, 80 (3d Cir. 1999). With mixed questions of law and fact, the court must accept the bankruptcy court's "finding of historical or narrative facts unless clearly erroneous, but exercise[s] 'plenary review of the [bankruptcy] court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 642 (3d Cir. 1991) (citing Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 101-02 (3d Cir. 1981)). The district court's appellate responsibilities are further informed by the directive of the United States Court of Appeals for the Third Circuit, which effectively reviews on a de novo basis bankruptcy court opinions. In re Hechinger, 298 F.3d 219, 224 (3d Cir. 2002); In re Telegroup, 281 F.3d 133, 136 (3d Cir. 2002).

2. **Background.** Debtor/appellant United states Mineral Products Company manufactures and sells spray-applied fire resistive material, insulation and acoustical products to the commercial and industrial construction industry in North America, Central America, South America and the Caribbean. Debtor is a closely-held business, with its CEO (appellant James Verhalen) owning a majority of the stock outright and controlling another substantial block of shares as administrator of an ESOP invested in company stock. There is no dispute that debtor was an

otherwise financially sound corporation which, nevertheless, filed for protection under the Bankruptcy Code in order to resolve its litigation exposure as a result of its manufacturing and selling asbestos-containing products between 1954 and 1972.

3. The underlying bankruptcy case is a rather modest one made complicated only by the presence of the substantial claims relating to asbestos exposure. (D.I. 21 at B1, B72, B97, B145, B152, B186, B240, B454) More specifically, the debtor was valued by its retained investment banker to be \$13.4 million. (D.I. 21 at B526) The trade debt is approximately \$3 million and the liquidated asbestos claims approximate \$10 million. (D.I. 21 at B540) The debtor, in its plan, has offered \$26 million to creditors. (D.I. 21 at B532) There is a qualified settlement fund for the asbestos claims of \$22 million. (D.I. 21 at B532) Significantly, debtor has described itself as a "wasting asset," with in excess of \$4 million already having been expended on professional fees. (D.I. 21 at B533)

4. The bankruptcy case was filed on July 23, 2001. Two years later, despite the interdiction of a mediator (D.I. 21 at B505), the parties were not working toward a consensual plan. From the record, it instead is apparent that debtor, trying to maintain control of the process in order to salvage its closely-held business, continued to request exclusivity. The asbestos claimants, trying to wring debtor dry of any assets for the

benefit of the unliquidated asbestos claims, were not interested in compromise but wanted the opportunity to file their own plan. In other words, these parties were not conducting themselves in a manner consistent with or conducive to a resolution in the interest of **all** the parties and the estate.

5. At the July 31, 2003 omnibus hearing, the bankruptcy court questioned whether either the debtor or the asbestos claimants could successfully bring the case to a fair and equitable resolution. Consequently, the bankruptcy court put the parties on notice that a Chapter 11 Trustee would be appointed sua sponte if the parties did not file a consensual plan by the end of August. (D.I. 21 at 517)

6. Not surprisingly, the parties did not file a consensual plan of reorganization. Instead, at the August 27, 2003 omnibus hearing, debtor presented a motion requesting the appointment of an investment banker to conduct an auction in connection with debtor's proposed plan of reorganization based upon the sale of debtor's assets. Through the proffered testimony of one of its directors, debtor opined that an auction was the most appropriate way to overcome the parties' impasse over valuation of the debtor. (D.I. 21 at B532) Through the proffered testimony of a representative of the proposed investment banker, debtor opined that its proposed auctioneer "would be independent and would make up its own mind, free of influence from Mr. Verhalen" (D.I. 21

at B531), despite the fact that the investment banker had been retained previously by debtor to value its assets. Debtor also argued that the appointment of a Chapter 11 Trustee would increase costs to the estate, through the prospect of competing plans and the expenses associated with the trustee's retained professionals.

7. Standing in opposition to debtor's motion for the appointment of the investment banker and in support of the appointment of a Chapter 11 Trustee were the asbestos claimants. These claimants argued that the investment banker suggested by debtor could neither be impartial in its role as auctioneer (given its past relationship with debtor) nor bring in the highest price for debtor's assets (given its past valuation and the absence of a § 524(g) injunction). (D.I. 21 at B536-542)

8. The court denied debtor's motion and ordered as follows:

The fact that there is such acrimony between the various creditor constituencies, at least the asbestos creditor constituencies, and the futures clients, so to speak, and the debtor and apparently the principal of the debtor makes this motion simply ill advised and I can't grant it at this point. Again, if it were another time, six months or more ago, maybe this would have worked. But it's not going to work now. It's just going to lead to more problems.

Unfortunately I believe that a Trustee has to be appointed here because the Court finds that such appointment is in the interest of creditors under Section 1104(a)(2). There are two reasons for my finding:

First, because the principal of the debtor, Mr. Verhalen, is the potential - is a potential creditor for this company and because, again, of the acrimony that exists between the creditor bodies and the principal, a neutral third person, is I believe, absolutely essential to maximize the value of this estate and to construct a plan that's acceptable to creditors.

The second reason is that the debtor's late filing of amended schedule inserting numerous additional creditors is troublesome and raises the question regarding the credibility of the debtor. That's the debtor, not debtor's counsel. I don't have any issue about debtor's counsel whatsoever.

The fact that these creditors may be paid off from insurance proceedings at one time or another or the fact that the debtor didn't think they needed to list them, for whatever reason, is simply no excuse for not listing them.

We wouldn't tolerate that in a consumer debtor, and certainly aren't going to tolerate it in a business as sophisticated as this one even - - albeit somewhat smaller than some of the other businesses that I have.

So the motion - my own motion is granted.

There will be a Trustee appointed.

(D.I. 21 at B555-556)

9. **Analysis.** Section 1104(a)(2) of Title 11 of the United States Code provides in relevant part:

(a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States Trustee, and after notice and a hearing, the court shall order the appointment of a trustee

(2) if such appointment is in the interest of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

10. The United States Court of Appeals for the Third

Circuit has explained §1104(a)(2) as follows:

Subsection (a)(2) . . . creates a flexible standard, instructing the court to appoint a trustee when doing so addresses "the interests of the creditors, equity security holders, and other interests of the estate." . . . Subsection (a)(2) allows appointment of a trustee even when no "cause" exists . . . Because subsection (a)(2) envisions a flexible standard, an abuse of discretion standard offers the most appropriate type of review for this subsection as well. [S]ection 1104(a) decisions must be made on a case-by-case basis . . . Subsection (a)(2) emphasizes the court's discretion, allowing it to appoint a trustee when to do so would serve the parties' and estate's interests. The movant . . . must prove the need for a trustee by clear and convincing evidence

In re Sharon Steel Corp., 871 F.2d 1217, 1226 (3d Cir. 1989).

11. I conclude that the bankruptcy court's August 27, 2003 satisfies this standard. More specifically, the record demonstrates by clear and convincing evidence that: 1) there was notice and a hearing;¹ and 2) the distrust and animosity between the parties and their unwillingness or inability to cooperate on anything but the expenditure of professional fees constitutes substantial justification for the appointment of a neutral officer to bring resolution to the case. The fact that the bankruptcy court sua sponte suggested such a resolution for the

¹The fact that the bankruptcy judge announced in open court at a regularly scheduled omnibus hearing his intention to appoint a trustee and scheduled a subsequent hearing to address the issue is sufficient notice to appellant debtor, a closely held corporation, and to Mr. Verhalen, debtor's CEO.

case, in my estimation, constitutes responsible judicial oversight, not an abuse of discretion. Indeed, the Third Circuit has very recently demonstrated how far that Court will go to support the sua sponte conduct of a judge so long as there was notice and an opportunity to be heard. See Gibson v. Mayor and Council of the City of Wilmington, 2004 WL 36059 (3d Cir. 2004).

12. Therefore, the bankruptcy court's appointment of a Chapter 11 Trustee is affirmed and the appeals denied.²

Sue L. Robinson
United States District Judge

²Given the Third Circuit's decision in In re Kensington International Limited, 2003 WL 23010148 (3d Cir. 2003), the parties are hereby put on notice that any appearance of a conflict of interest between the trustee's position in this case and his responsibilities in other cases will be reviewed on appeal with great care.